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NO. 1582

IN THE

Supreme Court of the United States

October Term, 1970

IN THE MATTER OF THE APPLICATION OF:

JOSEPH E. STEINER, JR.,
Petitioner

v.

THE OFFICER IN COMMAND, ARMED FORCES EXAMINING AND INDUCTION CENTER, AT HOUSTON, TEXAS, ET AL,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Joseph E. Steiner, Jr., prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit rendered in the above case.

OPINIONS BELOW

The Memorandum and Order of the United States District Court for the Southern District of Texas, Houston Division, of October 7, 1969, is reported at 304 F. Supp. 1157. The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on December 7, 1970, and is as yet unpublished. A copy of that opinion is printed as Appendix "A" to this petition. The order of the Court of Appeals below denying Petition for Rehearing was entered on January 18, 1971, and is printed as Appendix "B" to this petition.

JURISDICTION

The judgment sought to be reviewed from the United States Court of Appeals for the Fifth Circuit was originally entered on December 7, 1970. Petitioner's request for Rehearing was denied without opinion on January 18, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED

1. Does Section 10(b)(3) of the Act[1] license vigilantism? Or, may an illegally constituted committee parading as a Local Board of Selective Service, act beyond, outside and inconsistent with the authority granted a genuine Local Board by the Legislative and Administrative branches of government, and remain immune to the Judicial branch, also? (If so, the fact that many draft age citizens look to the street for their only hope of redress is not surprising). If so, does this mean the Se-

1. Military Selective Service Act of 1967, 50 U.S.C. App. § 450, et. seq., [hereinafter referred to as Section 10(b)(3)].

lective Service System is a fourth branch of our government, equal to and thereby immune from restraint by any of the other three branches?

Alternatively, is Section 10(b)(3) to be interpreted to prohibit the Judicial branch its function to decide a question of law (as distinguished from a fact question) when "ripe", after a registrant has exhausted all administrative remedies, and thereby consistent with the measure of judicial review required by constitutional due process?

2. Can the "No judicial review" of Section 10(b)(3) be literally read and withstand judicial scrutiny in the face of an individual's constitutional right to due process, (Fifth & Fourteenth Amendments), and Habeas Corpus, (Article I, Section 9, Clause 2, U. S. Constitution)? Can a citizen be physically held—actually deprived of his personal freedom of movement at a Selective Service Induction Center by a process unauthorized by law—and yet, barred from judicial relief?

Is the Writ of Habeas Corpus suspended by Congress' Section 10(b)(3)? Doesn't a citizen have recourse to habeas corpus whenever he is actually and physically deprived of his freedom of movement by coercion—even though held in the name of Selective Service?

3. Is blatant and gross denial by a Local Board of the statutory, regulatory and constitutional guarantees of due process sufficiently lawless conduct to allow pre-induction judicial review?

Incredibly, the Court below held that the Local Board's illegal procedures are judicially reviewable only by a Court after the military or a Marshal "has gotten" a registrant, regardless of ripeness and exhaustion of every

other remedy. Under the rulings below, the citizens of our country (the Home of the Free) must sacrifice their status as free men before they can be heard on a question of law by the Judiciary.

(Isn't that particular point of time and sequence not only distasteful to the individual but arbitrary?)

These rulings go even further. They would continue to deny the citizen access to his courts—not only of his injunctive relief against errors of law—but, also, deny him habeas corpus relief from unlawful (as distinguished from alleged errors of fact findings) detention under threat of prosecution.

Astonishingly, the Court below in fear of diluting the potency of the Great Writ, wiped it out altogether.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Article I, Section 9, Clause 2: The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety will require it.

Amendment V: No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Military Selective Service Act

Section 460 (b)(3): No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title . . . after the registrant has responded either affirmatively or negatively to an order to report for induction. . . .

STATEMENT OF THE CASE

Petitioner was a follower of law and order. Although a Local Board was illegally constituted and, further, acted illegally by denying Petitioner his process rights, he acted in full compliance with a purported order of induction, and reported to the Armed Forces Entrance and Examination Station at Houston, Texas, at 7:30 a.m. on July 3, 1969. While Petitioner was detained within the Induction Center, under the threat of prosecution should he not line up, be poked at, urinate, etc., all on command, his counsel filed a petition for Mandamus, Writ of Habeas Corpus, Temporary Restraining Order and Injunction with the United States District Court, Southern District of Texas, Houston Division. Jurisdiction in the District Court was invoked under and pursuant to the United States Constitution, Article I, Section 9, Clause 2 and 28 U.S.C. Sections 1331, 1361, 2241 and 2244. The Court refused any immediate relief and set a hearing for July 15, 1969. Additional attempts to obtain immediate relief proved fruitless, whereupon Petitioner refused induction. The Government filed no answer but moved for dismissal under Rule 12(b) and then on September 9, 1969, did indict Petitioner.

Petitioner filed a motion to convene a three judge Federal District Court because of the substantial constitutional questions presented. The motion was denied.

Petitioner offered evidence to the trial court supplementing his sworn petition. The facts, among others showed that his induction order was invalid as a matter of law because: (1) Local Board No. 59 was illegally constituted in that none of the Board's five members qualified under the Director's Regulations as residents within the Board's

jurisdiction, and the Chairman of Local Board No. 59 had served on the Board more than 25 years; (2) Local Board No. 59 applied an erroneous standard of law in their consideration of Petitioner's facts on a conscientious objection and hardship to dependents classification; (3) Local Board No. 59 failed to follow its own regulations and purported to act outside of its authority or jurisdiction in the processing due Petitioner by (a) refusing to reopen his classification to hear facts that would *prima facie* entitle Petitioner to a change in classification thereby denying him consideration by the Appeal Board—in controvention of its enabling statute[2] and regulations; and (b) the facts they did consider were not decided by a vote of the members but, were to the contrary, denied by some strange, unauthorized secretarial process.

The Court dismissed Petitioner's plea for relief for want of jurisdiction over the subject matter.

We seek reversal of the denial of jurisdiction.

REASONS FOR GRANTING THE WRIT

Petitioner accepts the constitutionality of Section 10(b)(3) as applied by this Court in *Clark v. Gabriel,*[3] but confident that the "no judicial review" can not be interpreted literally,[4] will show erroneous interpretation below. More particularly, as applied here, Section 10(b)(3) licenses

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2. The Local Board's Jurisdiction is defined in 50 U.S.C. App. § 460(b)(3) (Supp. IV 1969): "Such local boards . . . shall, under rules and regulations prescribed by the President, have the power . . . to hear and determine *subject to the right of appeal to the appeal boards.* . . ." (emphasis ours)

3. 393 U.S. 256, 89 S.Ct. 424 (1968).

4. Oestereich v. Local Board No. 11, 393 U.S. 233, 238; 89 S.Ct. 414 (1968).

blatant lawlessness in the name of selective service or "vigilantism" whereby the aggrieved have recourse only to the street. Our Courts cannot be closed thereby granting immunity to a committee to exist and act above any restraint of the law.

At the outset, it must be emphasized that Joseph Steiner is not seeking review of his Selective Service classification. Rather, he seeks only to protect his constitutional right to be heard, and to prevent the deprivation of his liberty until he has been afforded this constitutional right.

Specifically Mr. Steiner complains of the unlawfulness of (1) the forum (showing it was constituted in disregard of the qualifications prescribed by law) (2) its refusal to process—or consider—or deliberate—his fact contentions in the manner guaranteed him under the law and (3) its erroneous application of the law, ignoring the *Mulloy*[5] right to a reopening, and insisting upon a religious training and belief basis for conscientious objection despite *Welsh*.[6]

Requisite to "law and order" is that the courts be available to those aggrieved. To require a citizen to risk refusal of induction with its indictment, prosecution, and possible five year imprisonment plus $10,000.00 fine is a great price for admission into the courtroom. Perhaps, such is a constitutionally permissible price on questions of fact which Congress has authorized the administrative agency to decide. But here, the lower court goes much further. They exact too costly a price without regard to ripeness and exhaustion of remedies before a citizen may have the protection of his courts from obvious lawlessness, denying

5. Mulloy v. United States, 398 U.S. 410; 90 S.Ct. 1766 (1970).

6. Welsh v. United States, 398 U.S. 333; 90 S.Ct. 1792 (1970).

him (1) a proper forum (2) the procedural opportunity of a decision by the Local Board members present and voting (3) the procedural opportunity to establish his III-A and I-O Classification rights by personal appearance and (4) the right to appeal. They hold that the courts have no jurisdiction to protect him from an administrative agency exceeding its power or statutory jurisdiction. They interpret Section 10(b)(3) to require a registrant to refuse induction, ordered by an unlawful board, then be indicted and prosecuted for not having the deferment to which the purported Local Board denied him the procedural opportunity of establishing. The lower Court's interpretation of Section 10(b)(3) raises constitutional questions of due process, separation of powers, and in view of the physical restraint, Habeas Corpus.

Petitioner urges the interpretation of Section 10(b)(3) given in *Oestereich*[7] and *Breen*[8] plus the respect due Habeas Corpus.

CONFLICT WITH OESTEREICH AND BREEN

The instant case involves no element of discretionary judgment or evaluation of evidence. There are clean cut errors of law and excess of power or jurisdiction by Local Board No. 59 for which a remedy is sought.

First the Local Board's membership was illegally constituted. None of the members of Local Board No. 59 resided within the geographical jurisdiction of the board, (R. 26-31) and the chairman of Local Board No. 59 had served on the Board for more than 25 years. (R. 79).

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7. Oestereich v. Local Board No. 11, *supra*, note 3.

8. Breen v. Selective Service Board No. 16, 396 U.S. 460, 89 S.Ct. 1592 (1970).

This is in direct controvention of 32 C.F.R. § 1604.52 (c) and (d) respectively. There was no allegation by the government that it was "not practicable" to staff the Local Board with members who did reside within the Board's geographical area, and the evidence, by bill of exception, showed otherwise. Under the decisions an induction order issued by such an illegally constituted Local Board is void. See, e.g., *United States v. Beltran,* 306 F. Supp. 385 (N.D. Cal. 1969); *United States v. Lemke,* 310 F. Supp. 1298 (N.D. Cal. 1969); *United States v. Machado,* 306 F. Supp. 995 (N.D. Cal. 1969). These regulations are mandatory. In *Machado* the court notes that a mandatory interpretation would be the only one consistent with the basic assumptions underlying the Local Board system: *i.e.*, that the Local Board members are neighbors of the registrant; that the members are responsive to and under the scrutiny of the community; and that tradition of due process guarantees are not necessary because the registrant is to receive individualized and informal treatment by his neighbors.

Second, blatantly lawless was the pre-classification classifying done by the Local Board's secretary. She placed the registrants' files into stacks according to her discretionary judgment of "kind" and "difficulty". (R. 93-96).

Third, Local Board No. 59 "rubber stamped" and in so doing, was blatantly lawless. On December 4, 1968, it claimed to have considered the merits of the III-A, Hardship-to-Dependents facts of Joe Steiner and his grandmother, and refused to reopen as it disposed of 1277 other registrants within 135 minutes. (R. 54-55). Decisions at the rate of 6.342 seconds each! In the 90-minute meeting of June 4, 1969, with Steiner's voluminous C.O. facts before them, the Board purported to act on 780 cases as

it refused to reopen Steiner's classification. Approximately 6.6 seconds per case! (R. 35-42). These are typical instances of Local Board No. 59's pattern. (R. 55-64). Note, that never in its history was there a dissenting vote. All their minutes show a unanimous vote on every question.

The Board's explanation revealed that, following the "stacking" by its secretary, the files were divided among the individual members for decision. Such proceedings are in direct conflict with the authorizing regulations. 32 C.F.R. § 1604.56 provides:

> A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification. Every member present, unless disqualified, shall vote on every question or classification.

In *United States v. Wallen,* 3 SSLR 3125, 3126 (D. Minn. 1970), the court said:

> It does not require a lengthy argument to this court to convince that a 59 second appeal is not a meaningful appeal proceeding. It is almost a routine "rubber stamp" operation . . . It seems to the court that a 59.01 second review on a calendar involving 122 cases which are disposed of in a two-hour period cannot be anything but a cursory review, relying largely if not solely on the resume and recommendations made by the appeal board's clerk and is not a situation where the five individual board members exercise their own considered and independent judgment.

Where a registrant is entitled to a hearing pursuant to the regulations, this Court has held that such a hearing

must be a meaningful one and no sham substitute will meet this requirement. *United States v. Nugent,* 346 U.S. 1, 73 S.Ct. 991 (1953). Not only is this sort of activity lawless, it violates the deep rooted traditions of due process.

Fourth, Local Board No. 59 applied a wrong standard of law in denying Steiner his Conscientious Objection classification, and acted illegally by not reflecting in his Selective Service file any grounds, basis or reason why his claim was denied.

In his Selective Service Form 150 and in a subsequently submitted written summary Steiner accentuated that his religious conscious and moral beliefs would not permit him to participate in war of any form. Steiner's Selective Service file also contained letters from his mother, several teachers, ministers and friends, all testifying in effect to his sincere religious and moral objection to participation in war.

The ultimate question in conscientious objector cases is the sincerity of the registrant's objections. *Welch v. United States, supra.* To qualify for the Conscientious Objector classification it is not necessary to belong to an orthodox religious sect. The test of religious belief is whether it is a sincere and meaningful belief, occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption. Steiner's facts clearly met the criteria, but Local Board No. 59 did not apply the *Welch* standard. They refused to reopen Steiner's classification because it was determined that "his opposition was not based on religious training and belief." (Letter from State Director, July 2, 1969, in Steiner's S.S. file).

A Local Board is not free to reject claims because they consider them unreligious. Rather, their task is to decide whether the belief professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious. *United States v. Seeger,* 380 U.S. 163, 85 S.Ct. 850 (1965). There is not the slightest suggestion in Mr. Steiner's Selective Service file that his views are not sincerely held and that they are not religious in origin and nature. There are no inconsistencies in Steiner's statements or actions which would warrant denial of the Conscientious Objector classification. The Local Board did not doubt Steiner's sincerity. Indeed the Local Board gave no legitimate reason for its action and the government has been unable to suggest one.

Local Boards must state the grounds, basis or reasons in the registrant's file as to why a claim for Conscientious Objection was denied.[9] The courts have reasoned that a Local Board has the duty to reflect the reason for such denials in the registrant's file:

> Otherwise a court cannot determine whether a board's denial of a requested classification was based on a belief that the registrant's statement, even if true, did not entitle him to the classification, or, on the reasonable disbelief of certain allegations necessary to the registrant's *prima facie* case. United States v. Haughton, *supra* at 739 and cases cited therein.

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9. United States v. Boyles, 423 F.2d 1299 (4th Cir. 1970); United States v. Perdue, 425 F.2d 875 (4th Cir. 1970); United States v. Simpson, 2 SSLR 3655 (4th Cir. 1970); United States v. Lemmens, 430 F.2d 619 (7th Cir. 1970); Hemes v. McNulty, 432 F.2d 1182 (7th Cir. 1970); Kessler v. United States, 406 F.2d 151 (5th Cir. 1969); United States v. Haughton, 413 F.2d 736 (9th Cir. 1969); United States v. Washington, 392 F.2d 37 (6th Cir. 1968).

If the Local Board does not place this information in the registrant's file, as here, then the induction order is invalid. See, *e.g., United States v. Broyles, supra.*

Fifth, Local Board No. 59 acted illegally by refusing to reopen Steiner's classification and by so doing deprived him of his right to an administrative appeal.

Local Board No. 59 refused to reopen Steiner's classification in the face of *prima facie* evidence establishing his right to a I-O and III-A Hardship to Dependents classification and gave no reason for not reopening.

When a registrant is denied a reopening he has no right to a personal appearance or to an appeal. 32 C.F.R. §1625.4. Where, however, new facts are presented and a reopening is granted, the regulations consider a classification following the reopening, in all respects, as a new and original one, even if the registrant is placed in the same classification as before. 32 C.F.R. §1625.2 "[E]ach such classification [following a reopening] shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification." 32 C.F.R. §1625.13.

Thus, whether a reopening is granted is a matter of substance. Nevertheless, Local Board No. 59 refused to reopen Steiner's classification in the face of a non-frivolous *prima facie* claim for a change in classification based on factual allegations which were not refuted by other information in his file. This illegal action by Local Board No. 59 deprived Steiner of the attendant procedural rights of personal appearance and appeal. Such lawless action invalidates a Local Board's order to report for induction. See, *e.g., Mulloy v. United States, supra; United States v. Freeman,* 388 F.2d 246 (7th Cir. 1967); *Olvera v.*

United States, 223 F.2d 880 (5th Cir. 1955). Because of the seriousness of this procedural denial and the recent Third Circuit decision of *Hunt v. Local Board No. 197,* No. 18,076 (3rd Cir. Feb. 5, 1971) we feel it necessary to incorporate this as a separate part of our Petition and will discuss its constitutional ramifications in the following section.

2.

The Decision of the Court Below is in Direct Conflict With the Decision of the Court of Appeals of the Third Circuit Permitting Pre-Induction Judicial Review of Selective Service Procedures Where the Local Board Refused to Reopen a Classification.

Despite Petitioner's repeated strenuous effort to get a decision on the issue of a registrant's procedural rights, the trial court and the Court of Appeals below have steadfastly refused to even mention it. In declining to hold that the Local Board's refusal to reopen Steiner's classification in the face of *prima facie* facts entitling him to a change in classification is illegal and unconstitutional, therefore, subject to pre-induction judicial review, the decision of the court below is in direct and irreconciliable conflict with the decision of the Court of Appeals of the Third Circuit in *Hunt v. Local Board No. 197,* No. 18,076 (3rd Cir. February 5, 1971), printed as Appendix "C" to this petition. In *Hunt* the court held the reclassification procedures followed by Local Boards, which *ex parte* deny a registrant a hearing and an appeal, are both lacking in statutory authorization and violative of constitutional rights. Appendix "C" at A26.

On the right to a reopening with relief by pre-induction judicial review *Hunt* and *Steiner* are on all fours. Steiner and Hunt were classified I-A at the time of the changed conditions which entitled them to a reopening. Steiner had returned to his grandparents' small farm in Louisiana. His widowed grandmother's health had badly deteriorated and his aging aunt was unable to do many of the demanding chores of the farm. Their need of his support was severe. Without his assistance his grandmother and aunt would have been forced to sell the farm and leave the home where they had lived all of their lives. Steiner met this need. He worked the farm and brought in additional money for the much needed repairs from a part-time job. These are uncontroverted facts, which like Hunt, *prima facie* entitled Steiner to a III-A Classification. Steiner, like Hunt, informed his Local Board and asserted the hardship to his grandmother and aunt if he were to be drafted. Like Hunt's board, Local Board No. 59 refused to reopen Steiner's classification. Later, after seeing newspaper headlines of the *Sisson*[10] decision, Steiner applied for I-O Classification. Under the *Sisson* and *Seeger* test Steiner presented, through his SS Form 150 and supporting letters, a *prima facie* case.[11] Nevertheless, Local Board No. 59 again refused to reopen his classification. Following his second refusal for a reopening Steiner had no appeal within the administrative agency and no alternative but to seek relief from the courts.

The statutory authorization and/or constitutional rights challenged by both registrants are whether the regulations

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10. United States v. Sisson, 399 U.S. 267, 90 S.Ct. 2117 (1970).

11. See Stain v. United States, 235 F.2d 339 (D.C. Cir. 1956); an excellent discussion in Petrie v. United States, 407 F.2d 267 (9th Cir. 1969).

which permitted the Local Board to refuse to reopen their classifications and denied them an administrative appeal from this refusal, are consistent with the congressional directive "to hear and determine, *subject to the right of appeal to Appeal Board,* herein authorized all questions or claims with respect to . . . exception or deferment." 50 U.S.C. App., Section 460(b)(3) *supra* note 1. The Selective Service Act creates the right of appeal within the Selective Service System without any limitation. Thus, it was beyond the power or jurisdiction of Local Board No. 59 to deny consideration by the Appeal Board of Steiner's changed facts. The right to appeal the Local Board's adverse decision on the merits of a requested deferment is absolute. 32 C.F.R. § 1626. If Steiner's or Hunt's classification had been reopened, regardless of whether they received a new classification or not, they would have been guaranteed both the right of personal appearance before their local board and the right of appeal from its determination. 32 C.F.R. § 1625.13. By the tactic of refusing to reopen, Local Board No. 59 lawlessly prevented Steiner his personal appearance, the right to amplify the new facts presented, and prevented an appeal. Hence the question presented by both registrants, Is there a right to appeal a Local Board's unlawful denial of a reopening of a classification?

Hunt held that Section 10(b)(3) did not bar pre-induction judicial review when the Local Board refused to reopen a classification when presented with a *prima facie* case. Judge Gibbons, speaking for the majority (four separate opinions were filed) placed the *Hunt-Steiner* challenge within the ambit of *Oestereich* and *Breen.* In *Oestereich* and *Breen* the registrants sought pre-induction

review of the claims that the delinquency procedures employed by their Local Boards were not authorized by the statute, were inconsistent with their statutory exemption/deferments and facially unconstitutional.[12] Judge Gibbons said:

> I can perceive no valid distinction between the challenges to the delinquency reclassification procedures considered in *Breen* and *Oestereich* and the challenges to the reopening procedures made here.

The *Hunt* court distinguished *Clark v. Gabriel, supra,* in that there was no charge of procedural irregularity or abuse of discretion and that *Gabriel* was afforded "the full panoply of de novo administrative appeal rights." Whereas, in *Hunt* and *Steiner* the right to appeal was denied both registrants by an *ex parte* determination by their Local Boards whether or not to reopen. The *Hunt* court read the *Mulloy* case in conjunction with *Oestereich* and *Breen* and said:

> [T]hat the deprivation of administrative review by a local board which couches its decision on a *prima facie* claim in the guise of a refusal to reopen is an arbitrary action subject to pre-induction judicial review.[13]

In concluding the *Hunt* court emphasized the need for constitutional due process and administrative review *quid pro quo* for postponement of judicial review until a criminal or other post induction proceeding. To insure proper

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12. 393 U.S. at 239, 396 U.S. at 468.

13. Appendix "C" at A28.

application of Section 10(b)(3) the court presented its interpretation of the statute:

(1) The power of a Local Board to decide whether a change in circumstances entitled a registrant to a new classification is subject to administrative appeal whenever a prima facie claim is presented.

(2) The refusal of a Local Board to reopen when presented with such a prima facie claim is an abuse of discretion subject to judicial review. *Mulloy v. United States, supra,* and therein cited.

(3) Such an abuse of discretion is a clear legal error and judicial review of that legal error is available not only in post-induction habeas corpus and criminal cases but also in pre-induction mandamus or injunction cases. *Oestereich v. Selective Service Bd., supra. Breen v. Selective Service Bd., supra.*[14]

This interpretation is in direct conflict with the interpretation of the same statute, and similar facts made by the Fifth Circuit in *Steiner.* Applying the *Hunt* interpretation to the *Steiner* facts would require this case to be remanded to the District Court to determine if Steiner had notified Local Board No. 59 of changed conditions which *prima facie,* entitled him to a I-O or III-A deferment.

This Petition should be granted to resolve the conflict in the decision of the Court below with that in *Hunt.*

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14. Appendix "C" at A28-29.

3.

This Case Involves an Important Issue of Constitutional Law Which Affects Thousands of Registrants and Should be Authoritatively Settled by This Court.

The unique facts of Steiner's confinement by the Armed Forces presents this Court with a question of Constitutional law never authoritatively determined by any court. Joseph Steiner is seeking a Writ of Habeas Corpus to attack an illegal induction order. This alone does not make Steiner's case so extraordinary for there are many draft law cases where the Writ of Habeas Corpus was sought when a registrant was under an order to report for induction. What does make Steiner's case unprecedented is the fact that his restraint was actual, physical and close, within the Armed Forces Entrance and Examination Station at the very time his counsel was filing the petition for the Writ of Habeas Corpus. While in the induction center Steiner was not free. He was under the control and supervision of the Armed Forces, and forced to lineups, physical handling, compulsory toileting, etc. In this manner Steiner was illegally placed squarely between the horns of a dilemna in a predicament which is patently unconstitutional and forced to make a choice which no citizen should ever have to make. On the one hand, induction into the Armed Forces, or on the other hand, refusal of induction and federal prosecution.

Similar facts have been presented to a court only once before.[15] However, before a decision on the facts could be reached the registrant had been inducted into the Armed Forces. The Ninth Circuit frankly admitted that

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15. de Rozario v. Commanding Officer, 390 F.2d 532 (9th Cir. 1967).

the issue had not been briefed by the parties and gave its holding in the form of obiter dicta.

The courts below refused Steiner's petition for the writ stating that pre-induction judicial review via habeas corpus was prohibited by Section 10(b)(3) and was fearful that such judicial review of a Local Board decision would invite extensive interference with the conscription operation of the Selective Service System. This is the old cry of "flooding our courts." However, even if so this court has a higher responsibility than blind obediance to Acts of Congress and fear of judicial intereference with an administrative agency. This Court must preserve Constitutional rights.

Habeas Corpus is a remedy granted by the Constitution. As such it is invulnerable to limitations by Congress. Article 1, Section 9, Clause 2, states: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Mr. Justice Douglas, in *Scaggs v. Larsan,* 396 U.S. 1206, 90 S.Ct. 5 (1969), stated, "The Great Writ was designed to protect every person from being detained, restrained, or confined by any branch or agency of government. In these days it serves no higher function than when the Selective Service Boards . . . or the military act lawlessly." It is true that 50 U.S.C. App., Section 460 (b)(3) provides: "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted . . . after the registrant has responded either affirmatively or negatively to an order to report for indiction . . ."

Obviously, this section of the act and the constitutional right to Habeas Corpus are in contradiction. Any suspen-

sion of the privilege of the Writ of Habeas Corpus, even by an Act of Congress, would raise grave constitutional questions. Only the most explicit language by Congress could be held to have that effect. See *United States ex rel. Goldstein v. McNamara,* 270 F. Supp. 892 (E.D. Pa. 1967); *United States ex rel. Wilkerson v. Commanding Officer,* 286 F. Supp. 290 (S.D.N.Y. 1968). No such language appears in the Act.

Twice this Court, in order to preserve the constitutionality of Section 10(b)(3), has etched broad exceptions into the veneer of "no judicial review."[16] Once again the lower courts have suspended the Writ of Habeas Corpus in violation of the Constitution under an erroneous interpretation of an Act of Congress. This Court has previously established the constitutionality of Section 10(b)(3), but not in the face of a constitutional challenge to the right of Habeas Corpus. U. S. Constitution, Article 1, Section 9, Clause 2. In order for Section 10(b)(3) to remain within the established constitutional framework it must be interpreted by this Court not to preclude pre-induction Habeas Corpus relief to an illegal induction order. See House Report No. 267, 1 U.S. Code Cong. & Adm. News. p. 1333 (1967).

Extensive interference by the judiciary in the operation of the Selective Service System is a step no court should take except reluctantly. However, the wrong demands a remedy, and the jurisdiction of the federal courts established in 28 U.S.C., Section 1331 and Section 1361 (1964) must be exercised. The Great Writ—won on the fields of Runnymede—must not be surrendered to Local Board 59. The remedy for prevention of extensive pre-

16. Oestereich v. Local Board No. 11, *supra,* note 3; Breen v. Selective Service Board No. 16, *supra,* note 7.

induction litigation lies with the Selective Service System, which can adopt regulations that will conform with the constitutional mandate.

Petitioner concludes, as did Justice Douglas: "[T]hat in spite of the prejudice that exists against review by civilian courts of military action, habeas corpus is in the tradition of *Oestereich,* whenever lawless or an unconstitutional action is alleged."[17]

CONCLUSION

For the reason heretofore stated, Joseph Steiner, Jr. respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MANDELL & WRIGHT

By: _____

Attorneys for Petitioner
1901 First National Life Bldg.
Houston, Texas 77002
228-1521

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Petition for Writ of Certiorari to the United States Supreme Court were mailed to Mr. Anthony J. P. Farris, United States Attorney, Attorney for Respondent, Federal Building, 515 Rusk Avenue, Houston, Texas, and the Solicitor General, Department of Justice, Washington, D.C. 20530 on the _____ day of April, 1971, by depositing same in the United States mail properly stamped and addressed.

_____

John N. Barnhart

17. Scaggs v. Larsan, 396 U.S. at 1208, 90 S.Ct. at 7.

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28,846

In The Matter Of The Application Of:

JOSEPH E. STEINER, JR.,
Petitioner-Appellant,

versus

THE OFFICER IN COMMAND, ARMED FORCES EXAMINING AND INDUCTION CENTER AT HOUSTON, TEXAS, ET AL,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(December 7, 1970)

Before GEWIN, MORGAN and ADAMS,*
Circuit Judges.

ADAMS, Circuit Judge: This case raises two issues relating to judicial review of the decisions of a Local

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* Of the Third Circuit, sitting by designation.

Selective Service Board, prior to a registrant's induction.

Selective Service Local Board No. 59 ordered Joseph E. Steiner, Jr. to report for induction on July 3, 1969. On the day scheduled for induction, while Steiner was being processed at the induction center, his attorney filed a document entitled, "Petition for Writ of Habeas Corpus, Temporary Restraining Order and Injunction". Later that day, subsequent to having been found fit to serve in the Armed Forces, Steiner refused to submit to induction.

After an evidentiary hearing, the Honorable Allen B. Hanney, United States District Judge for the Southern District of Texas, made certain findings of fact not challenged on this appeal: After being graduated from college, Steiner sought several deferments from conscription. First, he asked to be classified II-C on the ground he was a farmer. Then, he asked for a III-A classification, asserting he was the sole support of his grandmother. The Local Board, after considering Steiner's claims, classified him I-A, and the Appeal Board affirmed. Thereafter, Steiner claimed he had incurred a physical disability and requested an appointment with the Local Board's Medical Advisor. The Local Board refused this request, ordered Steiner to report for induction, but postponed the date of induction in order to consider Steiner's assertion that he was a conscientious objector. In connection with this claim, the Local Board granted Steiner an interview, but after the interview it declined to reopen his classification.

In his petition to the District Court Steiner ascribed to the Local Board numerous procedural and sub-

stantive errors. He contended that he qualified as a farmer for a II-C classification and the Local Board's refusal to so classify him had no basis in fact. Steiner also claimed that the Local Board's refusal to reopen his classification to consider a III-A (hardship) classification, and a I-O (conscientious objector) classification, was arbitrary and a denial of due process because Steiner asserted he presented to the Local Board facts which entitled him prima facie to those classifications. Finally, Steiner contended that the Local Board's refusal to grant him, pursuant to his request, an interview with the Board's Medical Advisor and the fact that a majority of the members of the Local Board, although residents of the appropriate county, are not residents of the area over which the Board has jurisdiction, violates due process. Consequently, Steiner asserted that the order to report for induction exceeded the Board's statutory power, and that these issues may be raised prior to induction, despite §10(b)(3) of the Selective Service Act of 1967, 50 U.S.C.A. App. §460 (b)(3). Following its evidentiary hearing, the District Court dismissed Steiner's petition "for want of jurisdiction over the subject matter" referred to therein.

Because we affirm the District Court's holding that Steiner is prohibited by §10(b)(3) from pre-induction review of his allegations, we do not here decide whether the errors asserted make the Local Board's order of induction unenforceable. Such errors may be considered in connection with a petition for habeas corpus after induction or as a defense to a criminal indictment based on Steiner's refusal to submit to induction.[1]

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1. At oral argument we were informed by counsel that criminal proceedings have been instituted against Steiner.

Turning first to Steiner's petition for injunctive relief, we agree with the District Court that §10(b)(3) deprives the courts of jurisdiction prior to induction to decide the issues raised by Steiner. Section 10(b)(3) provides in part:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

It is Steiner's theory that he may obtain pre-induction adjudication of his claims, notwithstanding §10(b)(3), under the Supreme Court's construction of the Selective Service Act of 1967 announced in *Oestereich v. Selective Service Board,* 393 U.S. 233 (1968), and *Breen v. Selective Service Board,* 396 U.S. 460 (1970).

In *Oe ereich,* the Local Board had originally classified the registrant IV-D, the ministerial exemption provided by §6(g) of the Act, 50 U.S.C.A. App. §456(g).[2]

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2. Section 6(g) provides: "Regular or duly ordained minister of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration) under this title."

It later determined he was "delinquent" and reclassified him I-A, because Oestereich had returned his Selective Service registration certificate in order to express his opposition to the Vietnam war. The significant element in *Oestereich* and the basis for the Supreme Court's construction of §10(b)(3) was the clash between §10 (b)(3) and §6(g) of the Selective Service Act of 1967. The Supreme Court decided that Congress had not intended to prevent pre-induction judicial review in a case involving "a clear departure by the Board from its statutory mandate" in a "blatantly lawless manner". The Court made it clear that its holding applied only to the specific situation where "it was plain on the record" that the exemption is "in no way contested." 393 U.S. at 238.

Likewise, the Court in *Breen* considered the issue of the Board's power to deprive a delinquent registrant of a deferment previously granted when there was no doubt that Breen remained qualified for the deferment. 396 U.S. at 463-464. In *Breen,* the Local Board had classified petitioner II-S, a deferment for students provided by statute, 50 U.S.C.A. App. §456(h), but later reclassified petitioner I-A after he was declared "delinquent" for failing to have his draft card in his possession. Just as in *Oestereich,* the Government did not contest Breen's qualification for the classification originally assigned by the Local Board. The Court decided that *Breen* was controlled by *Oestereich* and repeated its view that Congress did not intend §10(b)(3) to bar pre-induction review when local boards deprived qualified students of their deferments as a punishment for "delinquency." *See e.g., Evans v. Local Board No. 73,* 425 F.2d 323 (10th Cir. 1970); *Shea v. Mitchell,* 421 F.2d 1162, 1165 (D. C. Cir. 1970). *Nestor v. Hershey,* 425 F.2d 504,

520 (D. C. Cir. 1969); *Sloan v. Local Board No. 1,* 414 F.2d 125 (10th Cir. 1969).

The allegations made by Steiner do not bring this case within the scope of *Oestereich* and *Breen,* because Steiner disputes the factual determinations made by the Local Board. Unlike Oestereich and Breen in the absence of a full evidentiary hearing it may not be said that Steiner has a clear and unequivocal right to a classification other than the I-A assigned to him by the Local Board. It is irrelevant whether the errors alleged by Steiner are substantive or procedural, because had the District Court permitted this case to be tried, in order to determine whether Steiner had been injured by the alleged irregularities, ultimately the Court would have been forced to decide whether Steiner is qualified for some classificaton other than I-A. Prior to induction such judicial determination of a registrant's classification is clearly prohibited by §10(b)(3). There is nothing in *Oestereich* or *Breen* that can be construed otherwise.

Rather than being controlled by *Oestereich* or *Breen,* this case is governed by *Clark v. Gabriel,* 393 U.S. 256 (1968) — the companion to *Oestereich* — in which the Supreme Court found §10(b)(3) to be constitutional and construed it as insulating from pre-induction, judicial review, all determinations of disputed facts made by local boards. The basis for the decision in *Clark* is equally applicable here — "To allow pre-induction judicial review of such [factual] determinations would be to permit precisely the kind of 'litigious interruptions of procedures to provide necessary military manpower (113 Cong. Rec. 15426 (report by Senator Russell on Conference Committee action)), which Congress sought to

prevent when it enacted §10(b)(3)." 393 U.S. at 258, *See Davis v. Members of Selective Service Board, No. 39, et al.* No. 29,078 (5th Cir., filed November 5, 1970); *Edwards v. Selective Service Local Board No. 111, et al,* No. 28,910 (5th Cir., filed September 15, 1970). For the foregoing reasons, we affirm the District Court's conclusion that it lacked jurisdiction to decide the issues raised in Steiner's petition for injunctive relief.

Steiner's appeal from the District Court's dismissal of his petition for habeas corpus raises a more difficult and subtle issue than that presented by the dismissal of his petition for injunctive relief.[3] In considering the habeas corpus petition, we emphasize that Steiner is not and never has been subject to military custody. The record is clear that Steiner refused at the induction center to make the symbolic gesture of stepping forward to acknowledge the exercise of military jurisdiction over his person. Had he done so, his petition for habeas corpus might well be within the subject matter jurisdiction of the federal courts. See, *Oestereich v. Selective Service,* supra, at 235; *Morgan v. Underwood,* 406 F.2d 1253 (5th Cir. 1969); In re Kelly, 401 F.2d 211 (5th Cir. 1968); S. Rep. No. 209, 90th Cong. 1st Sess., 10. Steiner's petition for habeas corpus is grounded upon his presence at the induction center for a short period of time — no more than a few hours. Steiner contends, since the Local Board ordered him to report to the induction center and any failure to comply with

3. Under Carafas v. Lavallee, 39 U.S. 234 (1968), this controversy is not made moot by Steiner's completion of pre-induction processing at the induction center and his subsequent departure from the center after refusing to submit to induction into the Armed Forces.

the order might subject him to criminal penalties,[4] that for the short time he was present at the induction center he was in "custody" within the meaning of the Habeas Corpus Statute, 28 U.S.C.A. §2241(c).

Federal courts considering the availability of habeas corpus prior to induction into the Armed Forces have uniformly held, with the single exception of Ex parte Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952), that habeas corpus is not available until the registrant is inducted into the Armed Forces. *Scaggs v. Larson,* 396 U.S. 1206, 1207 (note 2) (1969). The holding of Ex parte Fabiani has been rejected in *Lynch v. Hershey,* 208 F.2d 523, 524 (D. C. Cir. 1954), and criticized in *Developments in the Law — Federal Habeas Corpus,* 83 Harv. L. Rev. 1938, 1258-1259 (1970). In *de Rozario v. Commanding Officer,* 390 F.2d 532, 535-536 (9th Cir. 1967), the Ninth Circuit squarely held that mere presence at an induction center pursuant to an order by a local board is not a sufficient deprivation of liberty to make habeas corpus available. The Court stated that de Rozario "* * * was not physically detained by appellees, nor was he subject to military jurisdiction. He could have left the induction center had he so chosen, and would presumably have been subject to civil (nonmilitary) prosecution." 390 F.2d at 536.[5]

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4. 50 U.S.C.A. App. §462(a) provides a maximum five year prison sentence and a $10,000 fine for failure to perform a duty imposed under the Selective Service Act of 1967 or directions given thereunder.

5. That Steiner's presence at the induction center was not directly compelled is demonstrated by army regulations, which provide that "a registrant who refuses to take part in some or all of the processing, testing, or examinations, will be counselled as to the seriousness of his action, and advised that persistence in such action will necessitate

We agree with the reasoning in *Lynch v. Hershey,* supra, that the Local Board's order to report to the induction center does not constitute "custody" within the meaning of 28 U.S.C.A. §2241, because "If habeas corpus were an applicable remedy here the writ would of necessity have to be made available to every person who anticipates prosecution for violation of law. That has never been the function and purpose of habeas corpus and we deem it unwise to dilute the potency of the great writ by sanctioning its use in circumstances not related to actual confinement." 208 F.2d 423, at 524.

In *Biron et al. v. Collins,* 145 F.2d 758, 759 (5th Cir. 1944), this Circuit pointed out that Habeas Corpus is unavailable to test the lawfulness of Selective Service orders because the Selective Service has no power to seize and produce the registrant's body in answer to the writ. The fact that the disobedience to lawful board orders is a crime does not make those orders subject to review via habeas corpus.

As Judge Sibley said in the *Biron* case.

> "The law constantly threatens imprisonment to anyone who does not obey its commands, but one is not for that reason entitled to examine the validity of the law by writ of habeas corpus. A judge issues an order of injunction, perhaps erroneously, and it must be obeyed on pain of contempt, or a subpoena duces tecum may require attendance and production of papers which are privileged, and the person

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his return to his Selective Service Local Board * * * If he still persists in refusing to take part in some, or all, of the pre-induction processing, testing or examination, he will be returned to his Selective Service Local Board." Armed Forces Examining and Entrance Station Processing, Chap. 3, §II. Selective Service Law Reporter at 2239.

> must attend; but in neither case can a remedy be sought by habeas corpus before actual attachment and arrest, and then not against the judge, but against the officer who has actual custody." 145 F.2d at 759.

More recently, in *Edwards v. Local Board No. 111* No. 28,919 (5th Cir., filed September 15, 1970), this Circuit reiterated that the writ of habeas corpus "* * * can only be employed as a post-induction remedy * * *."

A view of all the circumstances surrounding Steiner's presence at the induction center persuades us that habeas corpus is not an appropriate procedure by which to attack the validity of the Local Board's induction notice. Steiner's Selective Service processing had not been completed until he was instructed to enter the Armed Forces, and until the very moment of induction the defects of which Steiner complains might have been corrected administratively without the aid of litigation. In addition the Board's procedures and determinations to the extent they are judicially reviewable may be attacked, as Congress intended, either by habeas corpus *after* induction or in a defense to a criminal indictment.

Accordingly, the District Court's dismissal of the action for lack of jurisdiction is affirmed.

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28,846

In the Matter of the Applications of:
JOSEPH E. STEINER, JR.,
Petitioner-Appellant,

versus

THE OFFICER IN COMMAND, ARMED FORCES EXAMINING AND INDUCTION CENTER AT HOUSTON, TEXAS, ET AL,
Respondents-Appellees.

On Appeal from the United States District Court for the Southern District of Texas

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(January 18, 1971)

ON PETITION FOR REHEARING

Before GEWIN, MORGAN and ADAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX "C"

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 18,076

GEORGE A. HUNT, JR.,
Selective Service No. 9-45-45-1035, *Appellant*
v.
LOCAL BOARD NO. 197

Appeal from the United States District Court for the Eastern District of Pennsylvania

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(D. C. Civil Action No. 69-1039)

Argued February 3, 1970

Before FREEDMAN, ALDISERT, and GIBBONS, *Circuit Judges*

Reargued October 13, 1970

Before HASTIE, *Chief Judge;* FREEDMAN, SEITZ, VAN DUSEN, ALDISERT, ADAMS and GIBBONS, *Circuit Judges*

OPINION OF THE COURT

(Filed February 5, 1971)

Per Curiam:

For different reasons, stated in separate opinions, five judges constituting a majority of the court have con-

cluded that the judgment of the district court dismissing the appellant's complaint cannot stand. Judges Freedman, Seitz and Adams think that the uncontested facts are such that we should not only reverse the dismissal of the complaint but also order that on remand judgment be entered for the appellant requiring that he be accorded selective service reclassification as III-A. Judges Hastie and Gibbons think that we should do no more than require that the district court consider and dispose of this controversy on its merits.

To achieve an otherwise lacking majority for a particular disposition of the appeal,[1] Judges Freedman, Seitz and Adams join Judges Hastie and Gibbons in voting for the less comprehensive disposition; namely, reversal and remand for appropriate action on the merits of the controversy.

It may be that, in the light of the circumstances pointed out in our several opinions, the parties will be able to agree upon a consent judgment that will obviate the necessity for adversary proceedings in the district court.

The judgment will be reversed and the cause remanded for consideration and disposition on the merits.

GIBBONS, *Circuit Judge,* concurring in the result.

Plaintiff appeals from the order of the district court dismissing his complaint pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, for want of jurisdiction over the subject matter. The Complaint claims jurisdic-

1. Cf. *Screws v. United States,* 1945, 325 U.S. 91.

tion under 28 U.S.C. §1331 (1964) (federal questions) and under 28 U.S.C. §1361 (1964) (mandamus against a federal official) and prays for relief appropriate under both sections. The complaint alleges that in June, 1968 plaintiff was cllassified I-A by the defendant Local Board; that he appealed this classification on the ground that he was a conscientious objector; that while that appeal was pending he notified the defendant Local Board of changed conditions which *prima facie* entitled him to a III-A deferment and requested that the Local Board reopen his classification; that the Local Board refused to reopen. The complaint does not specify what changed conditions were called to the attention of the Local Board. It alleges that the failure of the Local Board to reopen plaintiff's classification and consider his *prima facie* claim to a III-A deferment was a denial of his constitutional rights.

No answer was filed. Instead the defendant Local Board filed a motion under Rule 12(b) asserting:

> "(1) The court lacks jurisdiction of the person of the defendant.
> (2) The court lacks jurisdiction of the subject matter.
> (3) The venue of the action is improper.
> (4) Service of process was insufficient.
> (5) The complaint fails to state a claim upon which relief can be granted.
> (6) Plaintiff has an adequate remedy at law."

Neither party filed any affidavits on the motion. At the conclusion of the argument the district court invited the plaintiff "to complete your record as to what you are going to prove on the merits," and eight exhibits, letters from the file of the defendant Local Board, were marked

in evidence without objection. There was no waiver, however, by either party of the right to a final hearing after answer in the event of a ruling on the Rule 12(b) motion favorable to the plaintiff. At best there was a partial presentation by plaintiff of evidence in support of his Rule 65 motion for a preliminary injunction. The district court did not rule on that motion.

The exhibits disclose that plaintiff, who had received a II-S (student deferment) classification, was classified I-A in June of 1968. He appealed that classification to the State Appeal Board on the ground that he was entitled to a I-O (conscientious objector) classification. By letter on November 7, 1968 he notified the Local Board of his wife's pregnancy. This letter was supplemented by three letters from a physician confirming the pregnancy, the expected date of confinement in June of 1969, and certain other of the wife's health problems. When the State Appeal Board decided against him on his I-O claim plaintiff on April 7, 1969 requested a III-A classification, asserting both his impending fatherhood and hardship to his wife if he were to be drafted. The Local Board on May 2, 1969 advised him that it would not reopen. Although it does not appear in the record before the district court, the parties had advised this court that plaintiff is now a father. Neither plaintiff's fatherhood claim nor his hardship claim are referred to expressly in the complaint. It refers only generally to "changed conditions, which, *prima facie,* entitle Plaintiff to a 3-A deferment."

Defendants relied in the district court on lack of jurisdiction over the subject matter because of §10(b)(3) of the Selective Service Act of 1967, 50 App. U.S.C. §460(b)(3) (Supp. IV 1969). The order appealed from provided:

"ORDERED that defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) is GRANTED."

The district court opinion, although it makes reference to the nature of the III-A deferment claims asserted by plaintiff to the Board, is expressly limited to a determination of lack of subject matter jurisdiction. It makes no determination on any of the remaining grounds advanced by the defendant. It makes no determination (aside from that respecting subject matter jurisdiction) that the allegations of the complaint fail to state a cause of action. The district court did not treat the motion as one under Rule 12(b)(6) which it converted to Rule 56 motion. It expressly limited its order to granting a motion under Rule 12(b)(1).

Judge Freedman and the judges who concur in his opinion, looking at the exhibits which were marked at the hearing on the preliminary injunction, conclude that the Local Board acted solely on the mistaken legal ground that any II-S classification received after July 1, 1967, even one based on a post-baccalaureate student status, prevented a III-A fatherhood classification. See *Gregory v. Hershey,* 311 F.Supp. 1 (E.D. Mich. S.D. 1969). But on this sparse record it is not clear that the rejection of the fatherhood claim was the sole basis of the Board's action, nor do we know for certain whether the plaintiff's student deferment was pre-or post-baccalaureate. I would not assume original rather than appellate jurisdiction to decide the fatherhood issue which was never decided by the district court.

Judge Aldisert, and Judge Van Dusen who concurs in his opinion, also look at the contents of the exhibits to reject the plaintiff's fatherhood claim. They find that the exhibits do not evidence that appellant's II-S classification

was at a post-baccalaureate stage, and that appellant therefore failed to carry the burden of his immunity from service. They also would affirm a final summary judgment which was never made in the district court. But the more fundamental defect in their position is that it ignores the allegations of the complaint. Plaintiff complains that the Local Board refused to reopen. Thus, he says, he was denied the procedural opportunity to carry the burden of establishing his entitlement to a deferment. We cannot, by looking at those parts of the registrant's selective service file which are in the record, conclude that he has failed to meet a burden which he was never given an opportunity to meet.

On the hardship claim Judges Aldisert and Van Dusen confront the issue which was framed by the complaint and the Rule 12(b) motion and which was decided by the district court. That issue is whether, assuming the truth of the allegation that the Local Board failed to reopen after being notified of changed conditions which *prima facie* entitled plaintiff to a III-A deferment, §10(b)(3) barred pre-induction judicial review. It is on those pleadings that the same issue is presented here, since the district court order is expressly limited to a decision of the Rule 12(b)(1) motion. Since, assuming subject matter jurisdiction, the allegations of the complaint might well be controverted, I see no appropriate way to avoid the decision of that issue. Judge Freedman and the judges who concur in his decision distinguish between the undiluted question of law presented to the Local Board by the fatherhood claim and the mixed question of law and fact presented by the hardship claim. An erroneous Local Board decision of the former, they say, may give rise to an opportunity for pre-induction judicial review. The refusal

to reopen and consider the latter apparently would not. I do not think the opportunity to draw such a line is presented on this record.

Plaintiff was already classified when the changed circumstances occurred on which he relied for his change of classification from Class I-A to Class III-A. Class III-A includes persons deferred for reason of family relationship, 32 C.F.R. §1522.30(a), and for reasons of extreme hardship, 32 C.F.R. §1622.30(b). The regulations creating these classifications were adopted pursuant to 50 U.S.C. App. §456(h)(2)(Supp. IV 1969), which by virtue of the Universal Military Training Act of June 19, 1951, ch. 144, §1(o), 65 Stat. 84, limited dependency deferments for married men who had no dependents other than a wife to cases of extreme hardship.

The Local Boards are creatures of the Selective Service Act. Their jurisdiction is defined in 50 U.S.C. App. §460 (b)(3)(Supp. IV 1969):

> Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards *to hear and determine subject to the right of appeal to the appeal boards herein authorized,* all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title . . ., of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe." (emphasis added)

Regulations have been adopted which set forth the procedure for taking an appeal to the appeal boards, which the same statute creates in each federal judicial district. 50 U.S.C. App. §460(b)(3). (Supp. IV 1969); 32 C.F.R. pt. 1626 (1969). Recognizing that the status of a registrant is subject to change, the regulations provide that no classification is permanent. 32 C.F.R. §1625.1(a) (1969) and provide a mechanism for reopening the registrant's classification, 32 C.F.R. pt. 1625 (1969). The sections of pt. 1625 relevant to this case provide

> "The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; . . ." 32 C.F.R. §1625.2 (1969).
>
> "When a registrant . . . files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification . . ." 32 C.F.R. §1625.4 (1969).

If the Local Board determines that the information submitted does not warrant reopening, the regulations provide no right of appearance and no right of appeal.

Thus, under the regulations, establishment of a right to deferment because of changed circumstances following

an initial classification depends in the first instance on the *ex parte* determination by a Local Board whether or not to reopen. This determination is not appealable to an appeal board despite the fact that Local Boards are, under the statute, authorized only "to hear and determine subject to the right of appeal to appeal boards herein authorized." 50 App. U.S.C. §460(b)(3) (Supp. IV 1969).

The respondents would have us hold that the language "subject to the right of appeal to appeal boards herein authorized" either has no meaning or is limited by the later language:

> "The decision of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe."

The right of administrative appeal, in other words, would depend on whether and to what extent the President decides to allow it. In this instance, respondents contend, the President has seen fit not to allow it. He has permitted the Local Boards, by refusing to reopen, to eliminate administrative appeal.

As I will develop hereinafter, such a construction of the statute, when read together with a prohibition of pre-induction judicial review, raises very serious questions of due process and separation of powers. In fact, however, the courts have not so construed the statute.

This reclassification procedure has been before the courts in a number of cases. It is now firmly established that where a registrant presents to a Local Board facts which *prima facie* set forth a basis for reclassification the

local board *must* reopen. Failure to reopen where a *prima facie* case for reclassification is claimed has consistently been held to be a denial of procedural due process. *Mulloy v. United States,* 398 U.S. 410 (1970); *United States v. Turner,* 421 F.2d 1251 (3d Cir. 1970); *Davis v. United States,* 410 F.2d 89 (8th Cir. 1969); *United States v. Grier,* 415 F.2d 1098 (4th Cir. 1969); *Petrie v. United States,* 407 F.2d 267 (9th Cir. 1969); *Fore v. United States,* 395 F.2d 548, 554 (10th Cir. 1968); *Robertson v. United States,* 404 F.2d 1141 (5th Cir. 1968), *rev'd en banc* on other grounds, 417 F.2d 440 (1969); *Vaughn v. United States,* 404 F.2d 586 (8th Cir. 1968), vacated on other grounds, 399 U.S. 526 (1970); *Miller v. United States,* 388 F.2d 978 (9th Cir. 1967); *United States v. Freeman,* 388 F.2d 245 (7th Cir. 1967); *Townsend v. Zimmerman,* 237 F.2d 376 (6th Cir. 1956); *Stain v. United States,* 235 F.2d 339 (9th Cir. 1956); *United States v. Ransom,* 223 F.2d 15 (7th Cir. 1955); *United States v. Vincelli,* 215 F.2d 210 (2d Cir. 1954); *United States ex rel. Berman v. Craig,* 207 F.2d 888 (3d Cir. 1953); *United States v. Burlich,* 257 F. Supp. 906, 911 (S.D. N.Y. 1966).

While all but one of these cases involved post-rather than pre-induction review, all are quite directly in point insofar as the statutory jurisdiction of Local Boards is involved. All hold that despite the permissive of discretionary language of 32 C.F.R. §1625.2 a Local Board must, when faced with a *prima facie* claim of changed circumstances calling for reclassification, reopen and afford administrative appellate review. That part of the statute on which the respondents rely to establish that appellate review exists only when the President authorizes it makes no distinction between post- and pre-induction judicial review.

The *Mulloy* case would seem to put all doubts to rest, for in it Justice Stewart, for a unanimous court, writes:

> "Though the language of 32 C.F.R. §1625.2 is permissive, it does not follow that a board may arbitrarily refuse to reopen a registrant's classification." 398 U.S. at 415.

Thus it is beyond argument that a Local Board is obliged to reopen a classification when presented with a *prima facie* claim for reclassification. The remaining question is whether pre-induction judicial review is available when a Local Board fails to afford this opportunity.

Respondents rely principally on *Clark v. Gabriel,* 393 U.S. 256 (1968). That case is the slenderest of reeds. In the first place that per curiam opinion dealt with a situation entirely unrelated to the instant case. It did not involve reopening. The registrant was afforded a hearing before the Local Board on his conscientious objector claim. He was afforded the full panoply of *de novo* administrative appeal rights applicable to conscientious objector claims before the 1967 amendments to the Selective Service Act. There was no charge of procedural irregularity or abuse of discretion. Plaintiff's only contention was that the administrative process had made an erroneous determination of a factual issue after all administrative hearing and appeal safeguards were afforded. The case summarily reversed a district court decision that §10(b)(3) was unconstitutional even as so applied. Thus reliance on *Clark v. Gabriel* is justified only if the nonavailability of administrative review following a refusal to reopen can be ignored. To liken an administratively nonreviewable refusal to reopen to a reclassification determination which was followed by full administrative review, including a

de novo investigation and interview, we would have to ignore the *Mulloy* decision which said:

> "Even if the local board denies the requested reclassification [after reopening], there is a crucial difference between such board action and a simple refusal to reopen the classification at all." 398 U.S. at 414.

The Supreme Court observed, further, that precisely because judicial review is postponed in the *Clark v. Gabriel* situation "the opportunity for full administrative review is indispensable to the fair operation of the Selective Service System." Id. at 416.

In the second place, the language of the per curiam opinion in *Clark v. Gabriel* on which the respondents place such heavy reliance, represents the thinking of only three members, Justice Warren, Harlan, and Marshall. Justice Black voted against summary reversal. Justice Douglas concurred on a very narrow ground, and his brief opinion supports pre-induction judicial review where the Board has abused its discretion. A refusal to reopen and reconsider a *prima facie* claim of change in circumstances which would result in a reclassification has repeatedly been held to be an abuse of discretion. Justices Brennan, Stewart and White concurred in the judgment, but not in the opinion, for the reasons set forth in Justice Stewart's dissent in *Oestereich v. Selective Service Bd.*, 393 U.S. 233 (1968). They concurred, in other words, not because the distinction between *Oestereich* and *Clark v. Gabriel* suggested in the per curiam opinion in the latter case was valid, but because in their view *Oestereich* was wrongly decided. Thus the per curiam opinion on summary re-

versal in *Clark v. Gabriel* affords no guidance whatsoever to the proper construction of §10(b)(3).[1]

In *Oestereich* the Supreme Court rejected a literal reading of §10(b)(3) which would have barred judicial review even in a post-induction habeas corpus case. The case was remanded to a district court so that petitioner might have the opportunity to prove that he had been ordered to report for induction pursuant to the delinquency regulations, 32 C.F.R. pt. 1642, when he was entitled to an exemption as an enrolled divinity student.

The Second Circuit, in *Breen v. Selective Service Bd.*, 406 F.2d 636 (2d Cir. 1969), rev'd, 396 U.S. 460 (1970), assumed that the *Oestereich* interpretation of §10(b)(3) could somehow be circumscribed. It drew a distinction between reclassification of registrants seeking statutory exemption (such as divinity students, 50 U.S.C. App. 456(g)) and that of registrants seeking deferments

1. The *Mulloy* case sheds light on the limited precedential value of *Clark v. Gabriel* for present purposes. It was, of course, a post-induction case. But in listing the authorities establishing the *prima facie* claim test for reopening a classification it included not only most of the post-induction cases listed hereinabove but also Justice (then Judge) Stewart's own opinion in *Townsend v. Zimmerman, supra,* which is a pre-induction case. *Mulloy v. United States, supra,* at 415 n.6. This reference to *Townsend v. Zimmerman* must be contrasted with the reference to the same case in Justice Stewart's dissenting opinion in *Oestereich v. Selective Service Bd.*, 393 U.S. 233, 247, n.4 (1968). There he noted that the enactment of §10(b)(3) indicated specific congressional disapproval of exceptions such as *Townsend v. Zimmerman* to the rule against pre-induction judicial review laid down in *Witmer v. United States*, 348 U.S. 375, 377 (1955), *Estep v. United States*, 327 U.S. 114 (1946), *Billings v. Truesdell*, 321 U.S. 542 (1944), and *Falbo v. United States*, 320 U.S. 549 (1944). His dissenting view did not prevail, and in *Mulloy*, for a unanimous court he cited *Townsend v. Zimmerman* approvingly. While I do not claim that this footnote reference was a binding precedent for the instant case, at the very least it negates any indication that *Clark v. Gabriel* overruled *Townsend v. Zimmerman.*

(such as students, 50 U.S.C. App. §456(h)(1). The Supreme Court rejected this distinction, holding that the *Oestereich* exception was equally available to either category of registrant. Justice Black, writing for the Court said:

> "In both situations a draft registrant who was required by the relevant law not to be inducted was in fact ordered to report for military service. In both cases the order for induction involved a 'clear departure by the board from the statutory mandate.' *Oestereich, supra,* at 238, and in both cases §10(b)(3) of the Act should not have been construed to require the registrant to submit to induction or risk criminal prosecution to test the legality of the induction order." 396 U.S. at 467-68.

Both in *Oestereich* and in *Breen* Justice Harlan suggested a somewhat different formulation of the exceptions to §10(b)(3) than that announced in the opinion of the Court. In *Oestereich* he suggested that a challenge to the administrative procedure itself was beyond the competence of the Selective Service Boards to hear and determine and therefore outside §10(b)(3). *Oestereich v. Selective Service Bd.,* 393 U.S. at 242. In *Breen* he wrote:

> "The Court's opinion here, as in *Oestereich v. Selective Service Bd.,* 393 U.S. 233 (1968), appears to make the availability of pre-induction review turn on the lawfulness of the draft board's action, or to put it another way, on the certainty with which the reviewing court can determine that the registrant would prevail on the merits if there were such judicial review of his classification. On the other hand, under the test put forward in my concurring opinion in *Oestereich,* 393 U.S. 239-245, the availability of pre-induction review turns not on what amounts to an

> advance decision on the merits, but rather on the nature of the challenge being made.
>
> "In *Oestereich*, the registrant sought pre-induction review of the claims that the delinquency procedure employed by the board was 'not authorized by any statute,' was 'inconsistent with his statutory exemption,' and was 'facially unconstitutional,' 393 U.S. at 239." 396 U.S. at 468.

Whether under the test suggested by Justice Harlan or under that suggested by the majority opinions in *Oestereich* and *Breen*, it would seem that pre-induction judicial review is available of refusals to reopen when a *prima facie* claim has been filed. I can perceive no valid distinction between the challenge to the delinquency reclassification procedures considered in *Breen* and *Oestereich* and the challenge to the reopening procedures made here. As the case comes before us, plaintiff has given notice of a *prima facie* change in conditions entitling him to reclassification. He complains that the reclassification procedures followed by the Local Board, which *ex parte* denied him a hearing and an appeal, are both lacking in statuory authorization and violative of constitutional rights. That challenge to 32 C.F.R. §1625.4 (1969) is no different in kind than the challenge to 32 C.F.R. pt. 1642 (1969) permitted in those cases.

Moreover, *Estep v. United States, supra* and *Falbo v. United States, supra*, relied on by respondents, are not controlling. They only decided that a previous statute, §10(a)(2) of the Selective Training and Service Act of 1940, 54 Stat. 893, did not, despite its broad language to the effect that decisions of Local Boards were final except for administrative review, prohibit judicial review at some point. *Estep* and *Falbo*, by so construing that statute, as well as *Witmer v. United States, supra*, and

Billings v. Truesdell, supra, avoided the decision of the question whether Congress could constitutionally in the same statute (1) permit a local administrative agency to make an *ex parte* determination which is unreviewable in any administrative appellate proceeding if the local agency so decides, and (2) prohibit any review of the factual or legal correctness or even the fundamental fairness of that decision except in a criminal enforcement or post-induction habeas corpus proceeding. The Supreme Court has avoided deciding this same issue by its construction of §10(b)(3) in *Oestereich* and *Breen.*[2] It cannot be avoided if we accept the interpretation of §10 (b)(3) urged by the respondents in this case.

Administrative appellate review may be a sufficient due process substitute for pre-induction judicial review. But discretionary elimination by the original administrative agency of any administrative review, coupled with postponement of judicial review until a criminal trial or a post-induction habeas corpus proceeding, presents a much more complex due process issue. It is true that Congress has the power to give, withhold and restrict the jurisdiction of the lower Federal Courts. *Ex parte McCardle,* 7 Wall 506 (1868), and *Cary v. Curtis,* 3 How. 236, 245 (1845). Both this proposition and those cases are somewhat beside the point, however, for while Congress may have more or less unlimited power over the jurisdiction of the lower federal courts, the extent of its authority

2. In *Boyd v. Clark,* 398 U.S. 316 (1968), the Supreme Court also carefully avoided deciding whether the jurisdictional amount requirement of 28 U.S.C. §1331 would bar judicial review in selective service cases. It has never, so far as I know, explicitly addressed itself to this issue, which has not been raised in this case, perhaps assuming, as I do, and as Judge Hastie does, that 28 U.S.C. §1361 is a sufficient jurisdictional basis in this and similar cases.

to eliminate or postpone *any* judicial power to test the due process of an unreviewable administrative decision has not been determined. Taken literally, §10(b)(3) is applicable to *all* courts. Article III, §2 says that the judicial power of the United States "shall extend to all cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made. . . ." By interpreting §10(b)(3) as postponing judicial review only where the administrative remedies have been fully and legally afforded to the registrant in a non-arbitrary manner, the Supreme Court in *Oestereich* and *Breen* has avoided the necessity of determining the full meaning of Article III, §2 in the face of what may be a due process claim.[3] When *Oestereich, Breen* and *Mulloy* as read together point out a path which avoids a constitutional issue, that path should be followed. The *Mulloy* case, read in conjunction with *Oestereich* and *Breen,* indicates that the deprivation of administrative review by a local board which couches its decision on a *prima facie* claim in the guise of a refusal to reopen is an arbitrary action subject to pre-induction judicial review. If this is not so, §10(b)(3) may well be unconstitutional. *Clark v. Gabriel, supra,* holds no more than that postponement of judicial review is constitutional where administrative review has in the meantime been afforded.

It seems to me that the correct interpretation of 50 U.S.C. App. §460(b) is this:

(1) The power of a Local Board to decide whether a change in circumstances entitled a registrant to a new classification is subject to administrative appeal whenever a prima facie claim is presented.

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3. See *Oestereich v. Selective Service Bd.,* 393 U.S.233, 243 n.6 (1968) (Harlan, J., concurring).

(2) The refusal of a Local Board to reopen when presented with such a prima facie claim is an abuse of discretion subject to judicial review. *Mulloy v. United States, supra* and therein cited.

(3) Such an abuse of discretion is a clear legal error and judicial review of that legal error is available not only in post-induction habeas corpus and criminal cases but also in pre-induction mandamus or injunction cases. *Oestereich v. Selective Service Bd., supra. Breen v. Selective Service Bd., supra.*

A disturbing aspect of the construction of governing cases set forth in Judge Aldisert's opinion is its potential impact on post-induction judicial review. It suggests an interrelationship between *Clark v. Gabriel* and *Mulloy* which makes a decision to reopen "discretionary" in deferment claims cases such as hardship, where an evaluation of the claim (not the facts) "inescapably involves a determination of fact and an exercise of judgment." If this is true of a hardship claim, *a fortiori* it is true of a conscientious objector claim. By reviewing such Local Board refusals to reopen as discretionary, and the exercise of such discretion as beyond the scope of administrative review mandated by the statute, one might invite a reviewing court in a criminal or habeas corpus case to uphold such refusals to reopen on the same ground. It is quite difficult to reconcile any such unreviewable Local Board discretion with the holding in *Mulloy* that a Local Board must reopen unless a *prima facie* claim is "conclusively refuted" by the file. 398 U.S. at 416. I view the Mulloy standard for judicial review as looking no further than the legal sufficiency of the new facts alleged. This is exactly what federal courts always do on a motion under Rule 12(b)(6). Such a decision is neither factual nor

discretionary. Nothing in the language of §10(b)(3) or in the opinions in *Oestereich* and *Breen* suggest that a different scope of review of the legal sufficiency of the facts alleged applies in pre-versus post-induction cases.

The government urges in virtually every pre-induction selective service case that the interpretation of the statute suggested by the plaintiff will invite extensive judicial interference with the operation of the Selective Service System. Always we are reminded of the plight of the party, not before the court, who must serve in place of the registrant who obtains relief. But this interference with the operation of the system arises not because of judicial review but because of the nature of a selective rather than a universal system. Congress has chosen a selective service system. Having made that choice it may not subject individual registrants to methods of selection which fail to comport with due process standards. If it does so, the congressional power to raise armies may run afoul of the judicial power of the United States to enforce constitutional standards of due process of law in appropriate cases. In my view an adequate means of administrative review is a due process *quid pro quo* for postponement of judicial review until a criminal or other post-induction proceeding.[4]

Judge Hastie's position with respect to the disposition of this case is essentially no different from mine, except that he would read §10(b)(3) as possibly barring suits for injunction but inapplicable to mandamus actions. If

4. In his concurring opinion in *Oestereich v. Selective Service Bd., supra,* Justice Harlan noted that the opportunity for a hearing and administrative appeals prior to induction was one of the major considerations which impelled Congress to postpone judicial review. 393 U.S. at 240-41.

that position commanded a majority I would concur in his opinion and, as he does, leave to another occasion a discussion of the due process and jurisdictional issues. Since we are unable to agree on a majority opinion I feel it is appropriate to express the view that the *Oestereich-Breen* interpretation of §10(b)(3) is not limited to situations in which mandamus would be available.

I would reverse the order of the district court and remand for further proceeding to determine whether plaintiff had notified the defendant Local Board of changed conditions which, *prima facie*, would enable him to a III-A deferment. If the court should determine that he had, then I would require that the district court order the Board to reopen plaintiff's classification and hold a hearing on his claim for deferment.

FREEDMAN, *Circuit Judge.*

I would reverse the judgment of dismissal for want of jurisdiction. It denies relief to a registrant on the ground that he has not carried the burden of proving his right to a III-A fatherhood classification even though the decisive facts which establish his claim are now acknowledged and necessarily must be present in his selective service file.

When he made his application for a III-A fatherhood classification the registrant had no cause to believe that he should draw the Board's attention to the fact, now known to be decisive,[1] that his II-S classification was based on a post-baccalaureate student status. The Board, however, as it now appears, acted solely on the mistaken legal ground

1. See *Gregory v. Hershey*, 311 F.Supp. 1 (E.D. Mich. 1969).

that any II-S classification received after July 1, 1967, even one based on a post-baccalaureate student status, prevented a III-A fatherhood classification. That this was the basis of its action is clear-cut from the record. Its letter of rejection states: "Since you had requested and received a II-S deferment after July 1, 1967, you are not entitled to III-A for fatherhood."[2] The Board, however, is bound by the law as it is later declared to have been applicable in the proper classification of a registrant. The registrant is not bound by the Board's error of legal interpretation. Indeed, in view of the Board's relationship to him which requires the utmost fairness and helpfulness in deciding his claim as a matter of law,[3] it should itself have sought out the vital factor which required his III-A fatherhood classification.

This factor is not in dispute. It was agreed by the parties at bar that the registrant's II-S classification was based on his status as a post-baccalaureate student. There is no necessity for the Board to examine its file to determine the fact, for it is now made conclusive by the stipulation. It therefore seems to me unjust to affirm the denial of relief when the agreement of the parties shows that as a matter of law the registrant was entitled to a III-A fatherhood classification.

There remains then the question whether §10(b)(3) of the Military Selective Service Act of 1967,[4] prevents pre-induction judicial review of the Board's mistake of law.

There is involved in the present case no element of discretionary judgment or evaluation of evidence; there is

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2. Letter of Local Board No. 197, Appendix 23a.

3. *United States v. Turner,* 421 F.2d 1251 (3 Cir. 1970).

4. 50 U.S.C. App. §460(b)(3).

simply an undiluted question of law, which is an established basis for pre-induction review. See *Breen v. Selective Service Board No. 16,* 396 U.S. 460, 467-68 (1970); *Oestereich v. Selective Service System Local Board No. 11,* 393 U.S. 233 (1968).[5] The characterization in *Oestereich* of the conduct of a board which justifies pre-induction judicial intervention as "blatantly lawless" (393 U.S. at 238) is intended as a description of a clear-cut error of law. It does not require an intentional defiance of the law. Indeed, the phrase is used in the opinion as the equivalent of "basically lawless." (393 U.S. at 237)

Here the Board took a view of a highly debatable legal issue which I believe was the wrong one. Its action was lawless in the sense that it was contrary to the correct rule of law. It is of no material significance that in *Oestereich* the registrant sought a statutory exemption, whereas here he seeks a deferment. *Breen,* supra, at 467. Nor is it significant that the applicable law is established by a selective service regulation rather than by the statute. See *Breen,* supra, at 467; *Shea v. Mitchell,* 421 F.2d 1162, 1165 (D.C. Cir. 1970).

Since the agreement of the parties clearly establishes the registrant's right to a III-A fatherhood classification, I would reverse the judgment of dismissal and remand the case to the district court with direction to order the Board

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5. Mr. Justice Harlan, concurring in *Breen,* summarized the holdings in *Breen* and *Oestereich,* saying:

> "The Court's opinion here, as in Oestereich v. Selective Service Bd., 393 U.S. 233 (1968), appears to make the availability of pre-induction review turn on the lawfulness of the draft board's action or, to put it another way, on the certainty with which the reviewing court can determine that the registrant would prevail on the merits if there were such judicial review of his classification. . . ." *Breen,* supra, at 468.

to afford him that classification. I therefore do not reach the important conflict presented by the opinions of Judge Aldisert and Judge Gibbons.

Judge Seitz and Judge Adams join in this opinion.

HASTIE, *Chief Judge.*

Section 1361 of title 28, United States Code, explicitly grants the district courts "original jurisdiction of any action in the nature of mandamus to compel . . . . [any federal officer or agency] to perform a duty owed to the plaintiff." Invoking the district court's jurisdiction under that section, the complaint in this case includes a claim that the plaintiff is entitled to a peremptory writ of mandamus requiring federal officers, the members of the Selective Service Board, to perform a plain ministerial duty owed to him to reopen and consider anew his classification. When this controversy is considered as an invocation of jurisdiction under section 1361, I think some of the complications that have divided the court are avoided, or at least more easily resolved.

To begin with, I find no conflict between the above quoted grant of judicial power in section 1361 and restrictive requirement of section 10(b)(3) of the Military Service Act of 1967 that no "judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . ." 50 App. U.S.C. §460(b)(3) (Supp. IV 1969). Conceptually, mandamus is not "judicial review." To require a selective service board to perform a plain ministerial duty to reopen and consider anew what a registrant's

classification should be, is not to engage in "judicial review" of any classification. Rather, it is an exercise of a special and circumscribed power Congress has conferred upon the courts to protect the individual against arbitrary refusal to perform a public duty owed to the individual. Thus, I find it unnecessary to consider the interrelations of the *Oestereich, Breen* and *Clark* cases to which other members of the court have directed their attention. *Oestereich v. Selective Service Board,* 1968, 393 U.S. 233; *Breen v. Selective Service Board,* 1970, 396 U.S. 460; *Clark v. Gabriel,* 1968, 393 U.S. 256.

It remains to consider whether the plaintiff in this case adequately asserts an arbitrary refusal to perform in the plaintiff's interest such a duty as section 1361 contemplates. The complaint alleges that the board was under such a duty to reopen the registrant's case and consider his status anew. If the registrant made a request for reclassification "accompanied by written information not considered when the registrant was classified, which, if true, would justify a change in registrant's classification," 32 C.F.R. §1652.2, reopening was mandatory. Full documentation of this proposition appears in Judge Gibbons' opinion and need not be repeated here. However, it bears repeating that the Supreme Court has asserted that "[t]hough the language of 32 C.F.R. §1625.2 is permissive, it does not follow that a board may arbitrarily refuse to reopen a registrant's classification." *Mulloy v. United States,* 1970, 398 U.S. 410, 415. It is just such arbitrary refusal to act in a complainant's interest that the present complaint asserts and section 1631 is designed to correct.

Thus it seems clear to me that if the district court had considered only the complaint, the granting of the motion

to dismiss would have been error. But before acting on the motion, the court, *sua sponte*, suggested that the plaintiff disclose "what you are going to prove on the merits." The plaintiff acquiesced and introduced into the record a number of letters from the files of the local board. I am not prepared to say that the court erred in considering these letters as if they had been incorporated in the complaint. However, the letters do not show that the registrant had failed to supply the board with new information "which, if true, would justify a change in the registrant's classification" 32 C.F.R. §1625.2. They do show that the registrant requested a III-A reclassification because his wife was pregnant and his induction "would work a great deal of hardship on my wife and child." In addition, the board was supplied with written statements of the registrant's wife and her physician certifying her pregnancy and specifying serious physical and emotional disorders that she was experiencing. I do not see how it could reasonably be contended that these facts would not have "justified" reclassification upon the basis of extreme hardship, and no more than that is required to make reopening, with its attendant procedural rights, mandatory under 32 C.F.R. §1625.2. Thus, the material submitted by the plaintiff amplified and in no way contradicted the allegations of his complaint.

Apart from the showing made by the registrant on his claim of extreme hardship, Judge Freedman has taken the position that the registrant's representations to the board, if properly proved to be true, would have justified reclassification on the basis of fatherhood.[1] My difficulty

1. If the physician's representations concerning the wife's pregnancy were less detailed that 32 C.F.R. §1622.30(c)(3) required, amplification could and should have been sought after reopening.

with this contention arises out of the fact that the registrant had been classified II-S, and 32 C.F.R. §1622.30 explicitly precludes a deferment of a registrant on the basis of fatherhood after he has been classified II-S. There is a substantial question of interpretation, upon which reasonable men may differ, whether this restriction covers graduate, as well as undergraduate, II-S classifications. *See Gregory v. Hershey*, E.D. Mich. 1969, 311 F. Supp. 1. Mandamus under Section 1631 should be confined strictly to arbitrary action and I am not prepared to say that the board's reading of the regulation as covering every II-S classification was arbitrary, though upon judicial review, as distinguished from mandamus, that interpretation of the regulation might well be reversed as erroneous. *Cf. Guffanti v. Hershey*, S.D. N.Y. 1969, 296 F. Supp. 553.

Accordingly, I vote to reverse the judgment and require a denial of the board's motion to dismiss the complaint solely because the complaint, on its face and as supplemented, adequately asserts an arbitrary refusal to reopen to consider the registrant's extreme hardship claim.

ALDISERT, *Circuit Judge*, Dissenting.

I am not persuaded that any of the multifaceted approaches suggested in the various plurality opinions justify reversal of the district court. I am moved, therefore, to add to the existing proliferation of views a rather lengthy expression of my own position.

In my view, the dispositive question in this appeal is whether the local board's refusal to reopen and consider

appellant's requested III-A deferment involved determinations of fact and an exercise of discretion or whether, instead, it was based on non-discretionary standards mandated by statute or regulation. If the former, this civil action for pre-induction review of the board's decision should be barred by the jurisdictional limitation of Section 10(b)(3) of the Military Service Act of 1967, 50 App. U.S.C. §460(b)(3) (Supp. IV 1969), which provides there shall be no pre-induction review "of the classification or processing of any registrant."[1] If the latter, review should be permitted at this time under judicially recognized exceptions to the statute. *Oestereich v. Selective Service System Local Board No. 11,* 393 U.S. 233 (1968); *Breen v. Selective Service Local Board No. 16,* 396 U.S. 460 (1970). And at the risk of appearing meretricious, I feel compelled, in light of the approaches taken by several of my brethren, to point up the obvious: our decision, as an appellate tribunal, must be based on the record compiled in the district court.

Alleging federal question jurisdiction, 28 U.S.C. §1331, appellant sought to enjoin his local board from issuing an order for induction and requested, in the alternative, a reopening of his classification through mandamus against a federal official, 28 U.S.C. §1361. The board responded with a motion to dismiss, based in part on the contention that the district court lacked jurisdiction over the subject matter. Appellant appealed from the district court's dis-

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1. No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under §12 of this title . . . after the registrant has responded either affirmatively or negatively to an order to report for induction.

missal of the complaint "pursuant to Fed. R. Civ. Pro. 12(b)(1)."[2]

The gravamen of appellant's complaint is that he was denied due process in the consideration of his request for reopening. He argues that he established a *prima facie* case for a III-A deferment, based on "nonfrivolous allegations of facts that have not been previously considered by his Board, and that, if true, would be sufficient under regulation or statute to warrant granting the requested reclassification." *Mulloy v. United States,* ____U.S.____ (1970). He correctly contends that "where the registrant

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2. Appellee's motion to dismiss was based on Fed. R. Civ. Pro. 12(b)(1), (2), (3), (5), and (6). Since it was, in part, grounded on subsection (6) (failure to state a claim upon which relief can be granted), it could have been treated as one for summary judgment subject to the provisions of Fed. R. Civ. Pro. 56. This is so because the court considered not only the pleading but also eight separate exhibits which appellant introduced in support of his contention that entitlement to III-A deferment had been established as a matter of law. It was not improper for the court to have considered the exhibits in conjunction with its consideration of the Rule 12(b)(1) motion. Wide leeway is accorded the court in this circuit in considering all matters of record relevant to subject matter jurisdiction. See, *e.g.*, Berkowitz v. Philadelphia Chewing Gum Corp., 303 F.2d 585 (3 Cir. 1962).

From the transcript of the May 19, 1969, hearing, the following colloquy appears.

> THE COURT: I think I understand your position on the motion to dismiss, and I will take the matter under advisement.
>
> In the meantime, I suggest that you complete your record as to what you are going to prove on the merits.
>
> MR. EGNAL: Your Honor, what I have here are the seven letters.

Eight, not seven, letters were then introduced, without objection, as plaintiff's exhibits. Certain statements purporting to be additional factual background were then given by plaintiff's counsel who carefully and properly explained:

> MR. EGNAL: . . . The factual recitation that I just gave you is not proved. I don't know what Mr. Wright [government counsel] wants—I mean the proof would be in the file he has.

has set out new facts which establish a prima facie case for a new classification, a Board must reopen to determine whether he is entitled to that classification," *Mulloy, supra,* and once the Board reopens, it is required by the regulations to "consider the new information which it has received [and to] again classify the registrant in the same manner as if he had never been classified." 32 C.F.R. §1625.11. This new classification would afford the registrant "the right . . . of appearance . . . and appeal as in the case of an original classification." 32 C.F.R. §1625.13. It is the denial of a reopening and the resulting foreclosure of administrative review which appellant seeks to remedy by this action for an injunction or writ of mandamus.

Our task as an appellate court should be to decide whether the court below was correct—based on the facts before it—in holding that it was without jurisdiction to entertain appellant's action. We should, of course, be guided by the presumption that a federal court lacks jurisdiction until it has been demonstrated that jurisdiction exists,[3] and by the recognition that Congress has the power to give, withhold, and restrict the jurisdiction of the lower federal courts.[4] My principal line of inquiry

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3. Turner v. President, Directors and Company of the Bank of North America, 4 Dall. 8 (1799); WRIGHT, LAW OF FEDERAL COURTS, (2nd Ed. 1970) §7, at 15.

4. Ex Parte McCardle, 7 Wall. 506 (1868). In Cary v. Curtis, 3 How. 236, 245 (1845), the Court declared:

> [T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possesses the sole power of treating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with juris-

concerns, therefore, the applicability of Section 10(b)(3) and the effect of recent Supreme Court decisions construing the statute.

The record below discloses that appellant requested and received a II-S classification (student deferment) after July 1, 1967.[5] In June, 1968, he was classified I-A and unsuccessfully appealed to the state board on the ground that he was entitled to I-O (conscientious objector) status. While this appeal was pending before the state appeals board, however, appellant by letter of November 17, 1968, notified his local board (1) that his wife was pregnant, and (2) that he wished "to appeal [his] classification of I-A on July 11, 1968," for the reason that he was "entitled to the classification of III-A (3A)."

On November 22, a physician notified the board that he had examined appellant's wife and made a "presumptive diagnosis of pregnancy." Mrs. Hunt wrote on December 24 requesting the III-A reclassification for her husband, indicating that she was pregnant, that she had a "number of rectal problems." "a spastic condition of the bowel tract." "severe abdominal cramps and extreme tension resulting from my husband's dealing with the Selective Service System," and that "the nervous tension which has resulted from the potentiality of his being drafted led me to seek professional help." A second physician told the board that he had been treating Mrs. Hunt "since August 1, 1968, with irritable colon syndromes,

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diction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

See cases collected in WRIGHT, *supra*, §10, at 25 n.28.

5. The record does not indicate whether this student deferment was pre- or post-baccalaureate. See 32 C.F.R. 1622.25, 1622.26.

along with anorectal pathology," and that she had undergone a hemorrhoidectomy on September 18, 1968. Still a third physician communicated with the board on December 30, 1968, diagnosing a positive pregnancy with an expected date of confinement of June 24, 1969. The first doctor wrote again the next day advising that Mrs. Hunt was "under emotional distress as a result of her concern over her husband's possible induction."

Following the denial on appeal of his request for a I-O, and after the issuance of a new I-A classification, appellant wrote the board on April 18, 1969: "I wish to appeal my classification I-A dated April 7, 1969. I request you reclassify me in category III-A on the ground that:

"1 I am soon to be a father

"2 If I were inducted it would work a great deal of hardship on my wife and child."

The local board acknowledged the receipt of "supporting documents" for the III-A claim from appellant's wife and her physicians, but on May 2, 1969, advised him that, having "considered the information in your file submitted while your file was at the Appeal Board and since it has been returned," it "did not feel the information warranted reopening your case. Since you had requested and received a II-S deferment after July 1, 1967, you are not entitled to a III-A for fatherhood."

Initially, I must reject the position, which I once shared,[6] that the Military Selective Service Act of 1967 mandates an absolute right of administrative appeal from a local board's refusal to reopen and consider a request

6. Clark v. Commanding Officer, 427 F.2d 7, 11-12 (1970) (Aldisert, J., concurring).

for reclassification, irrespective of the quantum of evidence presented to the board. 50 App. U.S.C. §460(b)(3) provides:

> . . . Such local boards, or separate panels thereof consisting of three or more members, *shall under the rules and regulations prescribed by the President,* have the power within the respective jurisdictions of such local boards to hear and determine, *subject to the right of appeal to appeal boards herein authorized,* all questions or claims with respect to inclusion for, or exemption or deferment from, training or service . . . *The decision of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe.* (Emphasis supplied.)

A fair reading of the statute compels the conclusion that the right to an administrative appeal from a decision of a local board is not absolute but is dependent upon the existence of regulations conferring such a right. The statute merely *authorizes* the creation of rights of appeal and provides that appeals which are permitted by regulation shall be "taken in accordance with such rules and regulations as the President may prescribe." In the absence of provisions for an appeal, "the decisions of . . . local boards shall be final."

Clearly the regulations themselves are not open to the sweeping interpretation urged by appellant, particularly in light of *Mulloy, supra,* which established the necessity of proving a prima facie case as a prerequisite to reopening. Furthermore, the due process attacks on the regulations, based on their failure to provide for an appeal from

a refusal of a local board to reopen,[7] have proved unsuccessful, and the constitutionality of the regulations has been sustained. *United States ex rel. La Charity v. Commanding officer,* 142 F.2d 381, 383 (2 Cir. 1944); *United States v. Beaver,* 309 F.2d 273, 277 (4 Cir. 1962), *cert. denied,* 371 U.S. 951 (1963); *Boyd v. United States,* 269 F.2d 607, 611 (9 Cir. 1959); *Klubnikin v. United States,* 277 F.2d 87, 90-91 (9 Cir. 1955), *cert. denied,* 350 U.S. 975 (1956).

In determining the basis for the local board's refusal to reopen and consider appellant's request for the III-A classification—a determination that is critical to the jurisdictional issue of pre-induction review—separate attention must be given the two subsections of 32 C.F.R. §1622.30.[8] Subsection (a) deals with consequences of fatherhood; subsection (b), with hardship.

I turn first to the hardship claim based on §1622.30(b). For appellant to prevail in seeking pre-induction review,

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7. We are not presented in this case with the question of the right to an appeal from a *de facto* reopening clothed in the guise of a refusal to reopen. See Miller v. United States, 388 F.2d 973 (9 Cir. 1967).

8. 32 C.F.R. §1622.30 Class III-A: *Registrant With a Child or Children; and Registrant Deferred by Reason of Extreme Hardship to Dependents.*—(a) in Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category . . . except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph.

(b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support. . . .

he must, as I have indicated above, overcome Section 10 (b)(3), a statute of jurisdictional limitation which has already withstood constitutional attack. The Supreme Court has found "no constitutional objection to Congress' thus requiring that assertion of . . . claims . . . be deferred until after induction . . . or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction. *Estep v. United States,* 327 U.S. 114 (1946); *Falbo v. United States,* 320 U.S. 549 (1944)." *Clark v. Gabriel,* 393 U.S. 256, 259 (1968).

To be sure, this section has not received a literal interpretation. Exceptions to the Congressional restriction were found in *Oestereich v. Selective Service System Local Board No. 11,* 393 U.S. 233 (1968), and *Breen v. Selective Service Local Board No. 16,* 396 U.S. 460 (1970). But though it is true that *Oestereich* and *Breen* have permitted pre-induction review, they must be read in conjunction with *Clark v. Gabriel, supra,* the second of the Supreme Court's pre-induction review trilogy which was decided on the same day as *Oestereich.* In *Gabriel,* the Court distinguished a case in which the registrant "was by statute unconditionally entitled to exemption," as in *Oestereich,* from one which "inescapably involves a determination of fact and an exercise of judgment," 393 U.S. at 258, and declared that if a case fits within the latter category, there may be no pre-induction review. Thus, jurisdiction to entertain appellant's complaint should depend on whether the district court's resolution of his claim to a *prima facie* case and entitlement to reopening entails a "determination of fact and an exercise of judgment," as in *Gabriel,* or whether it requires a ruling on an alleged violation of a right over which the board has no prerogative, as in *Oestereich* and *Breen.*

Procedurally, the *prima facie* case is a standard designed to determine whether the quantum of evidence presented is sufficient to support a finding. One charged with the duty to decide whether such a case has been made out must accomplish an exquisite intertwining of functions. He must act not only as a fact-finder, but also as an evaluator of those facts. The discretion utilized in the evaluating process is so refined that the determination of a *prima facie* case in civil and criminal trials is exclusively a judicial function. In selective service cases, a *prima facie* case is present "if a registrant has presented facts which, if true and uncontradicted by other information contained in the file, would be sufficient under the regulations to warrant granting his requested classification." *United States v. Burlich*, 256 F. Supp. 906, 911 (S.D.N.Y. 1966).

But the Supreme Court has clearly said that there may be no pre-induction review where it is necessary to review "the quantum of evidence necessary to sustain a Board's classification," *Oestereich v. Selective Service Board, supra,* 393 U.S. at 238 n. 7, or, as noted before, where the action of the board "inescapably involves a determination of fact and an exercise of judgment," *Clark v. Gabriel, supra,* 393 U.S. at 258. Consistent with this approach, the Court in *Breen* distinguished between "discretionary standards" and "explicit requirements for student deferments."

This court's decision in *Bucher v. Selective Service System, Local Board Nos. 2, etc.*, 421 F.2d 24 (3 Cir. 1969), did not enumerate different standards. We held that Section 10(b)(3) does not bar pre-induction judicial review where the regulations and the classification procedures pursuant thereto are challenged "on the grounds that they lack statutory authorization, and/or violate constitutional

rights." We were careful to add that "[t]he Section bars pre-induction review only where there is a challenge to the System's resolution of factual questions in the classification or processing of a draft registrant." *Id.* at 27.

I cannot conclude that the circumstances of Mrs. Hunt's condition amounted to hardship as a matter of law. The assessment and evaluation of these circumstances—supported by letters referring to her rectal and bowel problems, abdominal cramps, tension and nervousness because of her husband's impending induction—were the responsibility of the local board, and it was for the board to decide whether such facts constituted a *prima facie* case of hardship justifying a reopening. This decision "inescapably involve[d] a determination of fact and an exercise of judgment," properly left to the local board. *Clark v. Gabriel, supra,* 393 U.S. at 258. To accept the position of Judge Gibbons and sanction pre-induction review of this decision would be to permit "precisely the kind of litigious interruptions of procedures to provide military manpower (113 Cong. Rec., 15426, Report by Senator Russell on Conference Committee Action) which Congress sought to prevent when it enacted §10(b)(3)." *Clark v. Gabriel, supra,* 393 U.S. at 258.

Moreover, I detect no inclination by the Supreme Court to restrict the holding of *Clark v. Gabriel* and to extend the exceptions of *Oestereich* and *Breen.* Indeed, in *Mulloy,* the Court, citing *Clark v. Gabriel,* re-emphasized the policy of a "narrowly limited scope of judicial review." In view of this strong and continuing policy, I am unable to accept Chief Judge Hastie's suggestion that Section 10(b)(3) can be avoided merely by the use of mandamus. I am convinced that the congressional objective was to min-

imize "litigious interruptions" of selective service procedures, whether the interruption be cast in terms of a request for an injunction or for a writ of mandamus.

It may be suggested that appellee's failure to file an answer amounted to an admission of the complaint's averments, thus obviating the need for factual findings by the district court and removing the *Clark v. Gabriel* issue from the case. Paragraph 6 of Complaint alleged:

> While the appeal was pending, plaintiff notified defendant of changed conditions which, prima facie, entitled plaintiff to a 3-A deferment.

I find no merit in this technical argument. First, no answer was required since appellee's motion to dismiss, served within the 60 day period and raising the Rule 12(b) defenses, was granted. And, although for the purposes of appellee's motion to dismiss—asserting as one ground the failure to state a claim under Rule 12(b)(6) —"the well-pleaded material allegations of the complaint [were] taken as admitted," "conclusions of law or unwarranted deductions of fact [were] not admitted." 2A MOORE'S FEDERAL PRACTICE §12.08 at 2266-69. It is clear that the existence *vel non* of a *prima facie* case was the ultimate issue that appellant sought to establish, requiring the application of relevant law to given facts. This being so, it cannot fairly be said that appellant's mere allegation of a *prima facie* case was taken as admitted by appellee.

Turning now to the fatherhood claim, it is arguable that 32 C.F.R. §1622.30(a) establishes standards for the fatherhood deferment which are explicit and non-discretionary, and which can be applied in the absence of

extensive factual findings. In *United States v. Worstell*, 419 F.2d 762 (3 Cir. 1969), we held that the II-S classification establishes a *right* to deferment for eligible registrants which may not be refused or withdrawn at the discretion of the local board. This right was analogized to the right to a IV-D ministerial exemption, the denial of which was subject to pre-induction review in *Oestereich, supra*. The Supreme Court subsequently made it clear in *Breen, supra*, that the II-S deferment is not to be treated differently from the IV-D exemption for the purposes of pre-induction review. In *Bucher v. Selective Service System, Local Board Nos. 2 etc., supra*, 421 F.2d at 34, we deemed it unnecessary, however, to decide whether the III-A classification "achieve[s] the dimension of statutory deferments akin to the statutory deferment status of the II-S (student) classification dealt with in *Worstell*," since the invalidity of the delinquency reclassifications created the entitlement to pre-induction review despite the limitations of Section 10(b)(3). Here, too, I find it unnecessary to decide whether the refusal of a fatherhood deferment—like the denial of a II-S—is open to pre-induction review. Even in the case of a non-discretionary deferment, the registrant must, in order to obtain review, show the court that his status formaly complies with that defined by the regulation or statute. A bare allegation that the Board has denied him that to which he is entitled is insufficient to overcome the jurisdictional barrier. In this case, appellant's charge that the board acted illegally in rejecting the fatherhood deferment was, on its face, insufficient.

Section 1622.30(a) provides that "a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 (June 30, 1967)

shall not be eligible for a classification in Class III-A under this [fatherhood] paragraph." Evidence introduced by appellant himself demonstrated his ineligibility, establishing that he "requested and received a II-S deferment after July 1, 1967." Moreover, I find no occasion to consider the correctness of *Gregory v. Hershey*, 311 F. Supp. 1 (E.D. Mich. S.D. 1969), which suggests that the III-A is barred only by a II-S received as an undergraduate and not as a graduate student, because there was no evidence in the record before the district court that appellant's II-S was obtained at a post-baccalaureate stage.

Judges Freedman, Seitz, and Adams do not, however, confine their review to that record. Instead, they rest their conclusions on information that was presented for the first time at oral argument before *this* court. "[T]he decisive facts which establish his [fatherhood] claim are now acknowledged. . . . This factor is not in dispute. It was agreed by the parties at bar that registrant's II-S classification was based on his status as a post-baccalaureate student." I agree with Judge Gibbons that we cannot "assume original jurisdiction rather than appellate jurisdiction to decide the fatherhood issue which was never decided by the district court." Implicit in the grant of jurisdiction to this court to review decisions of the district courts, 28 U.S.C. §§1291 and 1292, is the basic concept that our scope of review is limited to matters of record. Fed. R. App. Pro. 10.

Therefore, even were I to assume the validity of the *Gregory* distinction, I would hold that appellant failed in the trial court to sustain the burden of proving the post-baccalaureate II-S status and, consequently, immunity from military service.

In sum, I would hold that appellant did not establish the subject matter of jurisdiction of the district court because he failed to surmount the jurisdictional hurdle of Section 10(b)(3). He presented a request for a III-A hardship case which "inescapably involved a determination of fact and an exercise of judgment" by the local board, and not an issue capable of framing as a purely legal question involving an alleged "departure by the Board from its statutory mandate." *Oestereich, supra,* 393 U.S. at 238. What appellant presented to the district court was a question inextricably tied to a special factual context, the resolution of which was discretionary with the local board and mandated by neither statute nor regulation. Appellant was not deprived of his hardship deferment in a "blatantly lawless manner." And in asserting the right to a fatherhood deferment, he failed to demonstrate to the court below that his status was that designated by the regulation.

For all of the foregoing reasons, I would affirm the judgment of the district court.

Judge Van Dusen joins in this dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.